

Merit Systems Protection Board

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soon as possible after the date of the alleged violation or, if a complaint is filed with the Secretary of Labor, as soon as possible after receiving notice from the Secretary in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint, or, if the Secretary has referred the complaint to the Special Counsel and the Special Counsel does not agree to represent the appellant, as soon as possible after receiving the Special Counsel's notice.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.13 Content of appeal; request for hearing.

(a) *Content.* A USERRA appeal may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9);

(2) Evidence or argument that the appellant has performed service in a uniformed service, including the dates of such service (or, where applicable, has applied for or has an obligation to perform such service), and that the appellant otherwise satisfies the requirements for coverage under chapter 43 of title 38, United States Code;

(3) A statement describing in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38, United States Code, allegedly violated if possible.

(4) If the appellant filed a complaint with the Secretary of Labor under 38 U.S.C. 4322(a), evidence of notice under 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); and

(5) If the appellant's complaint was referred to the Special Counsel and the appellant has received notice that the Special Counsel will not represent the appellant before the Board, evidence of the Special Counsel's notice (a copy of the Special Counsel's notice satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the USERRA appeal, or within any other time period the judge sets. A

hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established. The judge may also order a hearing if necessary to resolve issues of jurisdiction. The appellant has the burden of proof with respect to issues of jurisdiction (5 CFR 1201.56(a)(2)(i)).

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board and that the Special Counsel has agreed to represent the appellant will be accepted as the written designation of representative required by 5 CFR 1201.31(a).

[65 FR 49896, Aug. 16, 2000]

§ 1208.15 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency employer or the Office of Personnel

Management has not complied with a provision or provisions of chapter 43 of title 38, United States Code (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees), the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the Federal agency employer or the Office of Personnel Management, as applicable, to comply with such provision(s) and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of such lack of compliance. Under 38 U.S.C. 4324(c)(3), any compensation received by the appellant pursuant to the Board's order shall be in addition to any other right or benefit provided for by chapter 43 of title 38, United States Code, and shall not diminish any such right or benefit.

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(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board has discretion to order payment of reasonable attorney fees, expert witness fees, and other litigation expenses under 38 U.S.C. 4324(c)(4). The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

§ 1208.16 Appeals under another law, rule, or regulation.

Nothing in USERRA prevents an appellant who may appeal an agency action to the Board under any other law, rule, or regulation from raising a claim of a USERRA violation in that appeal. The Board will treat such a claim as an affirmative defense that the agency action was not in accordance with law (5 CFR 1201.56(b)(3)).

Subpart C—VEOA Appeals

§ 1208.21 VEOA exhaustion requirement.

Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation and allow the Secretary at least 60 days from the date the complaint is filed to attempt to resolve the complaint.

§ 1208.22 Time of filing.

(a) Unless the Secretary of Labor has notified the appellant that the Secretary's efforts have not resolved the VEOA complaint, a VEOA appeal may not be filed with the Board before the 61st day after the date on which the appellant filed the complaint under 5 U.S.C. 3330a(a) with the Secretary.

(b) If the Secretary of Labor notifies the appellant that the Secretary's efforts have not resolved the VEOA complaint and the appellant elects to appeal to the Board under 5 U.S.C. 3330a(d), the appellant must file the VEOA appeal with the Board within 15 days after the date of receipt of the Secretary's notice. A copy of the Secretary's notice must be submitted with the appeal.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

5 CFR Ch. II (1–1–03 Edition)

§ 1208.23 Content of appeal; request for hearing.

(a) *Content.* A VEOA appeal may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9);

(2) Evidence or argument that the appellant is a preference eligible;

(3) A statement identifying the statute or regulation relating to veterans' preference that was allegedly violated, an explanation of how the provision was violated, and the date of the violation;

(4) Evidence that a complaint under 5 U.S.C. 3330a(a) was filed with the Secretary of Labor, including the date the complaint was filed; and

(5)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or

(ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the VEOA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established and it has been determined that the appeal is timely. The judge may also order a hearing if necessary to resolve issues of jurisdiction or timeliness. The appellant has the burden of proof with respect to issues of jurisdiction and timeliness (5 CFR 1201.56(a)(2)(i) and (ii)).

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.24 Election to terminate MSPB proceeding.

(a) *Election to terminate.* At any time beginning on the 121st day after an appellant files a VEOA appeal with the Board, if a judicially reviewable Board decision on the appeal has not been